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Supreme Court of the United States.

OCTOBER TERM, 1898.

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CHARLES WINSTON, *Petitioner*,
vs.
THE UNITED STATES. } No. 431.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE RESPONDENT.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE RESPONDENT.

These are criminal cases arising in the supreme court of the District of Columbia. Each of the petitioners was indicted and convicted of murder in the first degree, and on appeal to the Court of Appeals of the District of Columbia the judgment of the lower court, in each case sentencing the petitioner to death, was affirmed. The cases are brought

here by certiorari, and by stipulation of counsel the petition in each case, together with the transcript of the record of proceedings in the Court of Appeals of the District of Columbia, is taken for the return to the writ and, as stated, the record in the case.

STATEMENT OF THE CASES.

In the first case, that of Winston, the facts are as follows:

On the 10th of February, 1898, Winston was indicted for murder, it being averred in the indictment that on the 13th day of December, 1897, he wilfully, feloniously, and of his malice aforethought shot and killed one Emma Winston. To this indictment he pleaded not guilty, and on March 8, 1898, after trial had, the jury rendered a verdict of guilty as indicted. Emma Winston was the wife of the accused, and they lived together at No. 521 Third street southwest, in this city, where they occupied an upstairs front room. About nine o'clock in the morning of the day of the killing the deceased went to her room, where the accused was. All was quiet until about twelve o'clock noon, when there was a pistol shot, the sound coming from the upstairs front room, and the voice of Emma Winston was heard crying, "Lord, have mercy!" followed by the sound of other shots. Evidence was given tending to show that threats had been made by the accused against the deceased, and that he had once served a term in jail for threatening her. On page 4 of the record in 431 is a description of the wounds inflicted on the deceased, and on page 5 is recited by the officer who made the arrest of Winston the condition of the room when he entered it. Evidence was also given tending to show that the accused was himself badly wounded, and while at the hospital admitted that he shot himself, and said that he thought he had killed his wife. The accused took the stand in his own behalf, admitted that there had been no quarrel

between himself and wife, and that they lived happily together, and gave a version of the shooting which is fully set out on page 6 of the record, and thereupon rested his case. The justice presiding at the trial thereupon charged the jury as to the law of the case, and on pages 7 and 8 of the record will be found what the court said to the jury in regard to the act of Congress of January 15, 1897; to which portion of the court's charge the accused, by his counsel, duly excepted.

In the Strather case the facts are as follows:

Strather was indicted on the 31st day of December, 1897, for murder, it being charged that he wilfully, feloniously, and of his malice aforethought killed one Rosa Talbert on the 15th day of October, 1897, with a hatchet. To this indictment he pleaded not guilty, and the case was duly tried, and on the 10th of February, 1898, a verdict of guilty as indicted was rendered. The evidence showed that the accused and Rosa Talbert had been living together as man and wife; that the woman was the wife of another man; that she and the accused usually spent their nights together at a room rented by him; that for several nights prior to the homicide the woman failed to join him, and he threatened to kill her; that on the night of the homicide they occupied the same room, and the next morning, very early, the occupants of the lower rooms heard an unusual noise in the accused's room and summoned a policeman; that upon entering the room the policeman asked him what was the matter, and he replied that he reckoned it was a case of murder; that the woman was lying crosswise of the bed, dead, with six wounds upon her head, four of which went into the brain substance and were necessarily fatal; that the wounds were probably made with a hatchet such as the one produced at the trial, which, blood-stained, was found in the room. On page 4 of the record in No. 432 will be found a full description of the wounds inflicted. The accused, in

order to maintain and prove his side of the case, produced several witnesses and took the stand himself. His witnesses gave evidence tending to prove his previous good reputation as a peaceful and law-abiding citizen, the deceased's previous reputation as a quarrelsome and violent woman, and that the deceased had on previous occasions assaulted the accused, and that on one occasion she had cut him with a penknife, and had previously threatened his life, and that he knew of such threat; that there had been a quarrel between the deceased and the accused on the morning of the homicide; that upon the arrest of the accused, immediately after the homicide, there was a bleeding wound upon his face. The accused himself testified that the wounds in the head of Rosa Talbert were inflicted by him with a hatchet. He denied, however, that he had ever threatened her life, and claimed that when he struck the woman with the hatchet he was in fear of his own life, and that the wounds were inflicted by him in the heat and excitement of the quarrel and while he was suffering pain from a blow of the deceased on his left jaw. And thereupon the defense closed its testimony. Certain prayers were offered by the accused, which appear on pages 5 and 6 of the record in No. 432. All of these prayers were objected to by the Government, and the objections sustained. The refusal of the court to grant the prayers was merely a refusal to grant them "as asked and without modification." The court thereupon charged the jury at length upon the law of the case, and the only part of the charge that is objected to is what the court said to the jury as to its right under the act of January 15, 1897, which part of the charge appears on pages 11 and 12 of the printed record in No. 432.

In the Smith case the facts are as follows:

Smith was indicted on the 31st of December, 1897, for murder. The indictment charges that on the 15th day of November, 1897, Smith feloniously, wilfully, and of his

malice aforethought caused the death of one Edmonia Jackson with a hatchet. To this indictment he pleaded not guilty, and the case came on for trial. On the 17th of February, 1898, the jury rendered a verdict of guilty as indicted. At the trial evidence was given on behalf of the prosecution to show that the dead body of Edmonia Jackson, a colored woman, about thirty-three years of age, was found lying crosswise of a bed in the corner of the first-floor front room of premises 124 Madison alley northwest, in this city; that on the floor by the bed was found a hatchet covered with blood and containing some particles of hair of a colored person; that at the autopsy performed the day after the finding of the body, which was Friday, November 19, it was developed that the body was in a condition that indicated that the woman had been dead four or five days; that there was a transverse incised wound on the throat about four or five inches long, not very deep, evidently made with a sharp instrument, and two wounds in the back of the neck, to the right, the upper one immediately below the base of the skull, partly separating the skull from the vertebral column; that the wounds in the neck had the appearance of having been made with a hatchet, and were fatal; that there was also a cut in the palm of the right hand about two inches long, in which there was embedded a portion of the blade of a shoemaker's knife; that the portion of the knife found in the wound fitted a broken knife found in the accused's room. The Government further gave evidence tending to show that the Jackson woman lived at premises 124 Madison alley, with her husband; that the accused rented the first floor front room from her; that the accused and the woman's husband had a quarrel about her, and that both were arrested upon charges of assault and sent to jail; that the night before Smith was tried for the assault he threatened to kill Edmonia if she ever resumed living with her husband; that while in jail Smith saw her when she visited her husband

and said to other prisoners that he would fix her when he got out; that "it would be another case of Strather;" that when his term expired, on the 10th of November, 1897, some of the prisoners bade him good-bye, and he said they need not do that, because he would be back in a few days, but would be on the other side of the jail (referring to the side where serious offenders are confined); that when Smith was released he went to his room in Madison alley; that on the 13th of November Edmonia wanted to go to jail to see her husband, who was still there, but Smith prevented her from going; that on Monday, the 15th, he again forbade her to go to the jail; that Edmonia went to the jail that day and returned about four o'clock in the afternoon; that when she returned she had a quarrel with Smith about her visit to the jail, and about five o'clock in the afternoon she was in Smith's room and he was quarreling with her; that between six and seven o'clock she was seen going into Smith's room with him and was not seen alive after that; that about twelve o'clock that night the neighbors in the alley heard a loud sound, as of some one falling, and soon thereafter heard the front door of 124 open and some one pass up the narrow alleyway to the hydrant in the back yard and turn on the water; that about fifteen minutes later the water was turned off, and the person returned and entered premises No. 124; that on Tuesday, the 16th of November, Smith told Martha Williams, a friend of Edmonia's, that Edmonia had left the house about ten o'clock that morning to go to a service place; that afterwards he gave the Williams woman an address, and when she told Smith that she could not find Edmonia he gave her another address and told her that she need not bother about going there, that Edmonia would be home in a few days.

The Government further gave evidence tending to show that Smith was about premises 124 Madison alley every day from Tuesday until Friday, and was also there every night; that on the night of the 17th one of his neighbors walked

home with him and took the key to open the door leading into the room where Edmonia's body was found, and offered to go into the room with Smith, and that Smith refused to permit him to enter the room and went in alone; that after his arrest Smith told conflicting stories to the officers of his whereabouts from Monday until Friday, and that after his return to the jail he stated to prisoners there that he had killed the Jackson woman. And here the prosecution rested.

Evidence was given on the part of the accused to show that Mrs. Jackson had not visited the jail at the times prisoners at the jail said she was there, at which times they testified Smith made threats against her. And there the defendant rested.

The only exception in the case raises the same question as in the Winston case.

ARGUMENT.

As appears from inspection of the records, in each of the three cases the exceptions taken in the trial court are substantially the same, except that in the Strather case—No. 432—there are several exceptions to the refusal of the court to grant certain prayers not asked by the other petitioners on their trials. For convenience of treatment, the Strather case is first considered with respect to the exceptions not involved in the other cases.

I.

The Special Exceptions in the Strather Case.

1. The first prayer (Rec., p. 5) is faulty in that it does not correctly set out the law of self-defense, and if granted as asked it would have left the jury to believe that the defendant himself, and not the law, was to determine when

he could take the life of another. It ignores the fact that the apprehension or fear of his life or great bodily harm that excuses one for taking the life of another must be a reasonable fear or apprehension.

2. The second prayer (*ibid.*) is faulty, in that it does not fully define manslaughter, and would lead one to believe that one has a right whenever he has received a blow immediately to avenge it by taking life, without any reference whatever to the character of the blow and the situation of the parties, nor does it in any way enlighten the jury as to the degree of provocation essential to excuse anger and reduce a killing from murder to manslaughter. The same might be said of the third prayer (*ibid.*), which uses the words "in the heat of blood or immediate provocation" without in any way defining either of the terms, and ignoring the principle of law that the provocation must be such as to excite the passion of a reasonable man before it can operate to reduce a crime from murder to manslaughter.

3. The fourth prayer (*ibid.*) is erroneous in that it fails to state that the provocation under which the defendant was smarting at the time he inflicted the fatal blow must have been such as would have reasonably excited his anger and resentment.

4. The fifth prayer (Rec., p. 7) relates to the act of Congress of January 15, 1897, and will be hereafter considered.

5. The sixth prayer (*ibid.*) is uncertain and ambiguous and appears to have been intended for a prayer telling the jury that unless they believe certain facts beyond a reasonable doubt they should not convict the defendant of murder; but the prayer is defective in that it does not fully nor clearly set out the law in respect of the doctrine of reasonable doubt.

The court's attention is asked to the fact that the presiding justice at the trial refused to grant these prayers "as asked and without modification," and in his charge fully covered the law of murder, manslaughter, and self-defense, and to his instruction on these points no exceptions were taken by Strather's counsel. On pages 7 and 8 of the record will be found the charge of the court, wherein murder is fully and correctly defined to the jury, and on pages 8 and 9 will be found what the court below said in reference to manslaughter and self-defense.

It is submitted that Strather was not prejudiced by the refusal of the court to grant the prayers asked in his behalf, which were bad in law and were not based upon the evidence in the case, particularly as the court of its own motion fully, fairly, and correctly instructed the jury upon the points mentioned in the prayers; to which instruction of the court there was no exception.

"The charge of the court having correctly defined the law of the case, the refusal of the defendant's prayer would not have been error, even had it been technically correct and applicable."

Travers *vs.* U. S., 6 App. D. C., 450.

6. We consider next the contention made by the petitioner in case No. 432, that section 5339, Revised Statutes of the United States, is not in force in the District of Columbia, and that therefore the act of January 15, 1897, which amends that section, is not in force. The object of this contention is to establish the propositions, first, that section 5339 of the revision is not in force in the District of Columbia; second, that the act of January 15, 1897, amending that section is therefore not in force in the District; and, third, that the punishment of murder in the District of Columbia must therefore depend upon the laws of Maryland as they stood at the time of the creation of the District of Columbia.

In the case of the United States *vs.* Guiteau, 1 Mackey, 529, 530, the supreme court of the District of Columbia, speaking by Mr. Justice James, held that the statute of 1871 (16 Stats., 419), which enacted that the laws of the United States not locally inapplicable shall have the same force and effect in the District of Columbia as elsewhere in the United States, amounted to a substitution or amendment of the existing laws of the District of Columbia and related to section 5339 and gave that section force and effect in the District, even though it were not in force before that time. The opinion of Mr. Justice James goes into the whole matter, and the decision holds that section 5339 is applicable to the District of Columbia, and that the indictment against Guiteau was properly drawn under that section.

The Court of Appeals of the District of Columbia has often been called upon to determine whether general acts of Congress are applicable to the District of Columbia, and in accord with the ruling of this court in the case of Page *vs.* Burnstine (102 U. S., 664), and of the supreme court of the District of Columbia in the Guiteau case, has invariably held that acts of Congress relating generally to the Territories or other places over which the United States has exclusive jurisdiction apply to the District of Columbia.

Chase *et al. vs.* U. S., 7 App. D. C., 149.

The same Court of Appeals, in the case of Fearson *vs.* The United States (10 App. D. C., 536), refused to decide whether the act of January 15, 1897, was in effect in the District of Columbia, it not being necessary in that case to decide the question.

Our contention is that should this court adopt the suggestion of counsel for the petitioner in case No. 432, everything that was said in reference to the qualification of the jury's verdict was unwarranted, and the court below in telling the jury of the existence of the law gave the petitioner

the benefit of its provisions, when, in fact, the law was not in force and the petitioner not entitled to its benefits. If it be that section 5339, Revised Statutes of the United States, has no application to the District of Columbia, it is not necessary for us to go further in these cases, because section 2 of the act of January 15, 1897, could have no reference to the crime of murder punishable in the District of Columbia by virtue of a law derived from Maryland. In the first place, the cession act of 1801, which enacted that the laws of Maryland as they existed at the time should continue in force as a part of the law of the District of Columbia, in no way made the law of Maryland an act of Congress, but merely stated that the law of Maryland should be in effect in the District until Congress by an express enactment should repeal the same. Independently of this act of 1801, the Maryland law would have been in existence; so that the act of 1801 in reality gives no vitality to that law. Now, in section 2 of the act of January 15, 1897, which in certain cases abolishes the punishment of death and prescribes in lieu thereof the maximum punishment of imprisonment for life at hard labor, it is provided:

"That except offenses mentioned in section fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, when any person is convicted of any offense to which the punishment of death is now *specifically affixed by the laws of the United States*, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of an offense to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life."

It will thus be seen that this section applies only to offenses to which the punishment of death is now *specifically affixed by the laws of the United States*, and could have no ap-

plication to cases where the punishment of death was inflicted under the laws of the State of Maryland.

II.

The Exceptions Relating to the Act of January 15, 1897.

The portion of the act in question which is involved in the exceptions taken by the three petitioners alike is as follows:

"That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto the words 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

29 Stats., 487.

And the language of the court in instructing the juries respecting this act in the several cases is as follows:

In the Winston case the court, after informing the jury of the existence of the act of Congress allowing them to qualify their verdict by adding thereto "without capital punishment," said (Rec., pp. 7, 8):

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; *that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,'* it is your duty so to do. But the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the

definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfullness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offense—palliating circumstances that tend to show that the crime is not heinous in its character—the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury—cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury that propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words 'without capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the fact that you are brought here to try this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification."

In the Strather case the court said (Rec., pp. 11 and 12):

"If you should reach the conclusion, gentlemen of the jury, that your verdict should be guilty as indicted, *it is your right*, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.'

"As I had occasion to remark yesterday, the jury have

this power in any given case. *The court cannot control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it.* You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy or mercy render a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it."

The court then informed the jury of his idea of the object of the law, but stated that what he said was merely as an illustration; and then said:

"But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict."

And then the court, further on in the charge, said that, after they had reached the conclusion of the guilt of the defendant (if they reached that conclusion), the question that they were to ask themselves was this:

"Are the circumstances in the case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you upon your oaths to interfere with the penalty fixed by law? * * * *The responsibility of the outcome of this case is with you entirely. The court cannot help you any further.* You are not responsible for the law. The law has been made by the Congress of the United States and has received the approval of the Chief Executive. It was made for your protection and for mine. * * * Now, gentlemen, take this case and dispose of it, considering simply the law and the evidence you have heard, being actuated by no motives whatever, either of revenge or sympathy. Do justice between this man and the United States."

In the Smith case, in instructing the jury in regard to this act of Congress, the court said (Rec., pp. 7 and 8):

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify their verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed—that is, the penalty which the law fixes. * * * The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was a doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

And then the court, after telling the jury that they were not responsible for the law, nor for the act of the individual who placed himself within the law, and that the duty rested upon them to say whether the defendant was guilty or not, said that if they found the defendant guilty they should return a verdict of guilty as indicted, adding, in conclusion, "*whether you qualify it or not is a matter for you to determine.* If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors."

The contention of counsel for the several petitioners is that the trial court had no right to say to the juries anything concerning the act of January 15, 1897, except that it existed.

While in the Smith case what the court said on the subject of this statute would appear to have been said by the

court of its own motion, such was not the fact in the Strather and Winston cases.

Counsel for Strather invited the court to instruct the jury as to the effect of the act when they asked the court in their fifth prayer to tell the jury that if they found the defendant guilty they could return a verdict of guilty without capital punishment, "no matter what the evidence may be;" and in the Winston case the counsel for the defendant endeavored to impress upon the jury that not only did they have the right to qualify their verdict, but that it was their duty to so qualify it in every given case, and the court merely informed the jury what he thought was intended by the act, leaving them in each case perfectly free to exercise the right of qualification if they saw fit, telling the jury in each case that they were to determine the verdict, and not undertaking to decide anything for them.

A further objection is made to the charge of the court in the Winston case, that the court should not have informed the jury that the addition of the words "without capital punishment" must be by the unanimous consent of the jury; but in so doing the court only informed the jury what the law is—that is, in a criminal case the verdict of the jury must be unanimous.

The statute under consideration has not as yet received the judicial consideration of an appellate court, except the Court of Appeals of the District of Columbia in passing upon these cases, and nowhere do we find a statute exactly similar to it.

In several States of the Union laws have been passed allowing the jury in some cases to qualify the verdict and in others to fix the penalty, and while there are some differences among the authorities in construing the several acts, that difference arises either because the facts of the cases themselves are different, or because there is some statute that limits the authority of the court to instruct the jury, or

because the jury is to determine by their verdict the punishment, and has not merely the right, as given by the statute, to qualify the verdict if they think proper, thereby preventing the general sentence of death from being imposed. In this jurisdiction a court in instructing a jury proceeds under the common law, and has full power and authority to instruct the jury as to the law of the case and to comment upon the facts.

Statutes somewhat similar to that under consideration have been passed in the following States, the decisions in which States will be considered in the order given, namely: Alabama, California, Georgia, Illinois, Louisiana, and Texas.

In *Alabama* the statute reads:

"Any person who is guilty of murder in the first degree must on conviction suffer death or imprisonment in the penitentiary for life, at the discretion of the jury."
Cr. Code, 3729.

In considering this act the supreme court of Alabama in the case of Brown *vs.* The State, 109 Ala., 70 (decided in 1895), held the following charge proper:

"The court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law, to be exercised as a grave, solemn duty, *and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission, if it was committed by the defendant, and all the facts connected with or attendant upon the occurence* as shown by the evidence, and should then determine from a sense of duty which of the punishments so left to their discretion by the law is proper in the case and is best calculated to deter others from the commission of like offenses, and to protect the community from the perpetration of like offenses by others."

It will be seen that the jury were to fix the penalty under the above-quoted statute, but the court held that that discretion was a legal discretion. In this jurisdiction, as stated

by the Court of Appeals in the Fearson case, the punishment for murder is death, and that law has not been repealed; but there has been merely added thereto a right in certain cases for the jury to qualify their verdict; and, as said by this court in the case of Calton *vs.* Utah, considered below, they should consider the circumstances of the case when they so qualify their verdict.

In *California* the statute reads as follows:

"Every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the discretion of the jury trying the same."

Penal Code, sec. 190, as amended by act of March 28, 1874.

This statute was first considered by the supreme court of California in the case of People *vs.* Welch, 49 Cal., 174 (decided in 1874). In that case the court, speaking (p. 179) of the discretion mentioned in the statute, uses the following language:

"The nature of that discretion is to be ascertained by reference to the language of the statute. In Virginia it was held, that in an action *qui tam* the verdict should fix the amount of damages (Scott's case, 5 Grat., 697). Also, that where the duty was imposed on the jury of fixing the term of imprisonment, and the verdict did not ascertain such term, it should be set aside (Mills' case, 7 Leigh, 751).

"But the act amending section 190 of the Penal Code does not give the general discretion which juries exercise under the Virginia statute. Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed. It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the

statute definitions, the legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty, and of substituting another punishment in its stead."

This case is of especial significance, in view of the fact that in the course of its opinion, and on the same page of the report, the court quotes the statute of Louisiana, upon the consideration of which by the supreme court of Louisiana counsel for the appellants principally rely. Referring to its own statute, the California court says:

"A verdict fixing the punishment at imprisonment for life is somewhat analogous to the French verdict, 'Guilty with extenuating circumstances,' and is the equivalent of the Louisiana verdict, 'Guilty without capital punishment,' held good in State *vs.* Rohfrischt (12 La. An., 332), and authorized by the statute which provides, 'In all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life in the State penitentiary.' (Rev. Stat. of La., p. 163.)"

The California statute was further considered by the supreme court of that State in the following cases:

People *vs.* Jones, 63 Cal., 168, decided in 1883.
People *vs.* Murback, 64 Cal., 369, decided in the same year.
People *vs.* Brick, 68 Cal., 190, decided in 1885.
People *vs.* Olsen, 80 Cal., 122, decided in 1889.
People *vs.* Bawden, 90 Cal., 195, decided in 1891.
People *vs.* Leary, 105 Cal., 486, decided in 1895.
People *vs.* Kamaunu, 110 Cal., 609, decided in 1895.

In no one of the later cases is the authority of People *vs.* Welch impugned. In the case of People *vs.* Brick the court held the following instruction proper:

"If the evidence shows the defendant to be guilty of murder in the first degree, *but does not show some extenuating fact or circumstance*, it is the duty of the jury to find a simple verdict of guilty of murder in the first degree and leave to the law the responsibility of fixing the punishment."

In passing on this instruction the court says (68 Cal., 192):

"There is in this instruction no error. The discretion given the jury by the statute is not an arbitrary one, but is to be employed, as said by this court in People *vs.* Welch, 49 Cal., 179, 'only where the jury is satisfied that the lighter penalty should be imposed.' Of course, the jury could only be satisfied by the facts and circumstances of the case."

In the case of The People *vs.* Bawden, the court uses this language (90 Cal., pp. 197, 198):

"Appellant contends for a reversal on account of the instructions given by the court, numbered 23, 24, and 25. By these instructions the jury were told, substantially, that if they found the defendant guilty of murder in the first degree, and also found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstances, then they should allow the death penalty to be imposed.

"If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code, the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the code for any distinction in this regard between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in People *vs.* Brick, 68 Cal., 190. The same rule was also substantially stated in People *vs.* Jones, 63 Cal., 168; and in People *vs.* Murback, 64 Cal., 369, the language of the instructions approved was almost identical with that used by the court in the case at bar, although it may be said that in the Murback case the opinion of the court was hardly

in consonance with the instructions approved. The same rule seems to have been approved in People *vs.* Olsen, 80 Cal., 128.

"Similar instructions have no doubt been given in other cases now on their way here by appeal; for it is to be observed that whenever a doubtful instruction has been approved by this court, it has generally been seized upon and injected into future cases. Great confusion would therefore occur if we should enter into a new examination of this question, and should come to a conclusion opposite to that heretofore reached. Moreover, as was said by the court, on another subject, in People *vs.* Myers, 20 Cal., 520, 'we do not think this question has practically so much importance as is sometimes attributed to it'; for a juror, exercising the responsibility of choosing between the imprisonment of a defendant and his death, will act upon his own discretion, and not upon that of another. Therefore, we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

And the contention on the part of the appellants that the later cases of People *vs.* Leary and People *vs.* Kamaunu overrule the earlier cases is not well founded. In the Leary case the court, in dealing with the contention of counsel for the accused that the verdict was against the law and the evidence, says (105 Cal., 495):

"We do not understand counsel as attacking, under this head, the sufficiency of the evidence to justify the jury in finding the defendant guilty of murder, but the contention seems to be that the facts of the case were not such as to warrant the infliction of the death penalty. We confess to some cloudiness of apprehension of this point, and are at a loss to understand exactly upon what ground counsel expects us to review the action of the jury in this respect. The law submits to the jury, under the instruction of the court, the question as to the degree of murder, if any, of which the defendant is guilty in any instance, and section 190 of the Penal Code further provides that one found guilty of murder in the first degree 'shall suffer death or confine-

ment in the State prison for life, *at the discretion of the jury.*"

"Whatever may have been the actuating consideration in the minds of the legislature in enacting section 190, whether because they believed there are instances of murder falling within the definition of murder of the first degree, which, because characterized by a less degree of atrocity or other mitigating circumstance, call for a milder punishment than that of death, or whether their reason was something else, the fact remains that they have confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect."

In the Kamauuu case all that is said on the subject is the following (110 Cal., 613):

"There is no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot correct or advise them on the subject further than to inform them of their function."

In this case, as appears, counsel for the accused solicited from the court an instruction to the jury which it was the evident object of counsel should be in such terms as to direct the attention of the jury to supposed circumstances of mitigation or such as might appeal to the sympathies of the jury; the exact opposite of the position of counsel for the appellants in these cases, whose contention is that the court should say nothing further than to inform the jury of the existence of the statute in question. The effect of the decision in the Kamauuu case, therefore, is simply that it is not error for a judge to refuse to do more than to call the attention of the jury to the provisions of the law, leaving it to the jury to render such verdict as, without the aid of the court, it might deem proper.

There is, therefore, evidently nothing in any of the California cases derogating from the authority of People *vs.*

Welch, and the ruling of the court in that case stands as the law under the California statute.

The statute of *Georgia* in relation to cattle-stealing imposes a penalty of confinement in the penitentiary of from two to four years "unless the jury trying the case shall recommend the prisoner to mercy; in that event he shall be punished as prescribed in section 4310 of this code" (Code, sec. 4399).

In Johnson *vs.* State, 58 Georgia, 491 (decided in 1877), the trial court charged the jury as follows (p. 492):

"If you should find him guilty, you may inquire what were the circumstances under which he stole this colored man's cow, and brought her to town to sell her. Were they such as to justify you in recommending him to the mercy of the court? What mitigating circumstances, if he is guilty, are there to warrant you in recommending him to the mercy of the court? If any, he is entitled to their benefit. If, in your judgment, he stole the cow, and there were any circumstances connected with it such as to warrant you in recommending him to the mercy of the court, why then it would be your duty to do it; but if there be none to justify you in recommending him to the mercy of the court, why then you ought not to do it."

The supreme court of Georgia, dealing with this instruction, said (p. 493):

"Section 4310 prescribes punishment not more severe than the chain-gang, fine of a thousand dollars and imprisonment six months. So that a recommendation to mercy grades this offence as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances, or any peculiar circumstances whatever. But the mercy of the jury, the neighbors of the man, is free; and freely it may be

bestowed in *any* case. It is lodged, too, by the General Assembly, whether wisely or not we are not called upon to say, *in the jury*, and not in the judge. Ordinarily, punishment, its degree and extent, is vested in the court, the occupant of the circuit bench; but the statute, in these offences, vests it in the jury to the extent of saying that this man shall not go to the penitentiary. Whether they ought or ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying. Inasmuch as the effect of the charge of the court was to restrict a right in the jury which the law did not restrict, and as it might have prevented this jury from saying, by their verdict, that the defendant shall not be sent to the penitentiary, we feel obliged by the law to reverse the judgment, and to grant a new trial."

Another statute of Georgia provides as follows:

"The punishment of persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases; if the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony the presiding judge may sentence to confinement in the penitentiary for life; in the former case it is not discretionary with the judge; in the latter it is."

Of this the supreme court of Georgia, in the case of Hill *vs.* State, 72 Ga., 151 (decided in 1883), says (pp. 132, 133):

"This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; it is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion; it does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed, by its charge, restrictions upon the jury unauthorized and unwarranted by the statute."

In Inman *vs.* State, 72 Ga., 269 (decided in 1884), the same court says (pp. 279, 280):

"The eighth assignment of error complains that the court restricted the jury in the exercise of their right to recommend the defendant to be imprisoned in the penitentiary for life. The errors complained of are: 'If you find him guilty, and the case be one you think you are justified in doing so—the facts and circumstances justify you in doing so—you can say in your verdict "We recommend he be imprisoned in the penitentiary for life."'

"We do not think that the language used by the court was calculated to deprive, circumscribe or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill *vs.* State, decided at the last term of the court. Yet, we think in cases like this, the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

In Marshall *vs.* State, 74 Ga., 26 (decided in 1884), the court, considering the charge of the trial court, said that the trial court in effect told the jury that the recommending imprisonment in the penitentiary for life was a matter entirely with the jury, upon which the court gave them no instruction, as he had no right to do so, and that it was a matter of which the jury had absolute control; and such charge the court held to be in exact accordance with the ruling in Hill *vs.* State (p. 32).

In Valentine *vs.* State, 77 Ga., 470 (decided in 1886), one of the assignments of error was (p. 481):

"After the jury had been out in their room several hours without being able to agree, they were brought into court, and the court, on being informed that they had not agreed and wished to be further instructed, asked them what the difficulty was. One of the jurors replied that it was the question of recommendation, and that the jury desired to

know whether, in the event they, the jury, failed to recommend to mercy, the judge had any discretion himself in fixing the punishment. To which inquiry the judge replied as follows: 'That question is entirely with you, gentlemen of the jury. If you find the defendant guilty, the law leaves no alternative to the court but to sentence him to death. It is for you to say from the evidence, from all the facts and circumstances of the case, whether, in the event you find him guilty, you are warranted in recommending him to imprisonment in the penitentiary for life; and if you render a verdict with that recommendation, the court is bound to sentence him accordingly.' The error complained of being, in the opinion of the defendant, that the language used in the supplementary charge again limited the jury in their right to recommend by the facts and circumstances of this case, and that there was a repetition of the error assigned in the fifth and foregoing assignments of error."

In dealing with this assignment of error the court said (p. 482):

"We think that the error herein assigned on these two grounds of the motion amounts to nothing, because the issue of law made is settled by the case of Inman *vs.* The State, 72 Ga., 269. That case covers this. The distinction taken there between that case and Hill *vs.* The State, 72 Ga., 131, also exists here. The case of Johnson *vs.* The State, 58 Ga., 491, relied on so strongly by the able counsel for plaintiff in error, is for the offense of cattle-stealing, and arose under a different statute in respect of the power of the jury on the subject of punishment. Moreover the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'why then you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

In Thomas *vs.* State, 89 Ga., 479 (decided in 1892), the following is stated in the syllabus:

"The evidence warranted the verdict and the verdict was not rendered illegal by the failure of the jury to recommend

imprisonment for life as the punishment, such recommendation being in all cases matter of discretion with the jury."

The report of the case stops with the statement of the case and of the names of counsel for the parties. There is no opinion of the court in the report and nothing in the statement of the case to show how the question indicated in the syllabus arose.

In the case of Cyrus *vs.* State, 29 S. E. Rep., 917 (decided in 1897), the court said (head-note 2, by the court):

"Following the cases of Inman *vs.* State, 72 Ga., 269, and Valentine *vs.* State, 77 Ga., 470, this court cannot hold it to be cause for a new trial in a murder case that the judge, after charging: 'The punishment for persons convicted of murder shall be death, but shall be confinement in the penitentiary for life if the jury trying the case shall so recommend. If you find the defendant guilty, it is in your discretion whether you will recommend that he be imprisoned for life. You are not limited or circumscribed, and the law provides no rule for guidance'—added: 'If you think this is a case in which you would be justified in recommending a life imprisonment in the event of your finding the defendant guilty, you have a right to make such recommendation, as it is for you to say, in the event of your finding the defendant guilty, whether the facts and circumstances in this case warrant you in making such recommendation. It is all a question for you, under the law and the evidence.' (*a*) As an open question, however, some of the language above quoted would be subject to serious criticism. It would in such cases be decidedly better to omit the use of the word 'justified,' and of the word 'warrant,' and to substitute in their stead language leaving the jury free to dispose of the question of recommending or not recommending life imprisonment, without any intimation from the bench as to what should control or influence them in reaching a conclusion upon this matter."

In *Illinois*, the statute relating to murder provides as follows:

"Whoever is guilty of murder shall suffer punishment of death or imprisonment in the penitentiary for his natural

life or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict."

Section 190 Cr. Code.

Under this statute, the supreme court of Illinois in Fletcher *vs.* People, 117 Ill., 184 (decided in 1886), held that evidence is admissible to enable the jury properly to fix the degree of punishment, and that in such case the defendant has the right to give evidence which tends to show that his conduct was less culpable than shown by the prosecution.

And in Nowacryk *vs.* People, 139 Illinois, 336 (decided in 1891), the court, after pointing out that evidence such as that spoken of in the earlier case would be immaterial in the absence of the statute, and could not even have a tendency to reduce the grade of offense from murder to manslaughter, said (p. 342):

"While the statute recognizes no degrees in the crime of murder, yet by providing for so wide a scale of punishment it clearly recognizes the fact that the crime may be committed under circumstances manifesting different degrees of turpitude. The evident design of the statute is that the punishment shall be proportioned to the turpitude of the offense, and it follows that evidence having direct and legitimate bearing upon that question should be given to the jury so as to enable them to fix the punishment understandingly and justly. * * * We are of opinion that the evidence offered in this case had a legitimate bearing upon the question of the degree of turpitude of the offense of which the defendant stands convicted and that he was entitled to have it submitted to and considered by the jury."

In *Louisiana* the statute is very similar to the act under consideration. It is set out in the opinion of the court in the case of State *vs.* Melvin, 11 La. An., 535 (decided in

1856). In that case the court in its opinion says (pp. 536, 537):

"We find error, which may have prejudiced the prisoner, in that portion of the judge's charge to the jury, which is embodied in the following bill of exceptions: 'Be it remembered that on the trial of this cause, the judge, in his charge to the jury, and at the beginning and in the course of his said charge stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts, in the penitentiary, seldom served out their term when confined there for life; that a late governor of this State had pardoned almost everybody, and that convicts were always in the hope that, after a few years, they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice now common of man and woman killing; that he, the judge, on a late visit to the penitentiary had been told, by parties sentenced by him, inmates of the State prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c.'

"It is obvious that the charge as above detailed embraced several matters of fact within the personal knowledge of the judge, which would not have been admissible in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them.

"If there could be a doubt under the English common law, with regard to the propriety of such a charge in a criminal case, the legislative enactments of Louisiana would compel us, however reluctantly, to say that it was erroneous. The act of April 30, 1853 (Sess. Acts, p. 249), declares 'that in his charge in criminal cases, the judge must limit himself to giving the jury a knowledge of the law applicable to the cause submitted to them.' And the act of May 29, 1846 (Sess. Acts, p. 118), had previously declared 'that in all cases where the punishment denounced by law is death,

it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' and that whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall only be sentenced to hard labor for life, in the State penitentiary.'

"Under these statutes, the judge should carefully avoid giving the jury any indication of his own opinion, touching the facts of the case, or the guilt or innocence of the prisoner.

"And the qualification of the verdict should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

It is to be observed that, as will be more particularly dwelt upon hereafter, the judgment of the court in reversing the trial court turned as well upon a statute requiring the judge to limit himself in his charge to giving the jury a knowledge of the law applicable to the case as upon the statute allowing the jury to qualify its verdict. Indeed, it is not going too far to say that the decision of reversal depends rather upon the former statute than upon the latter.

In the earlier case of State *vs.* Shields, 11th La. Ann., 395 (also decided in 1856), the trial judge remarked to the jury:

"Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime."

On appeal the supreme court of Louisiana said:

"Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, 'without capital

punishment.' We think the discretion of the jury should not have been trammelled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner."

And in the course of its opinion the court referred to the previous case of State *vs.* Obregon, in which the prisoner was accused of arson. In that case the trial judge instructed the jury "that it was their duty to find an unqualified verdict if the case was clear." Of this the court, in the Shield's case, says:

"This charge was held to be erroneous, as being 'tantamount to an instruction that if a person was found guilty of arson he should always be punished with death, for, unless the case was clear beyond all reasonable doubt, they could not find the prisoner guilty at all.'"

In State *vs.* Rohfrischt, 12 La. An., 382 (decided in 1857), the defendants were indicted for arson and the verdict was "guilty without capital punishment." A motion was made in arrest of judgment, of which the court (p. 383) says:

"Defendants move to arrest the judgment upon the ground that the verdict of 'guilty without capital punishment' is equivalent to a verdict of not guilty of the offense charged in the indictment, because the statute for such case made and provided declares that any person convicted of such offense shall suffer death.

"The law is as stated, but the verdict is justified by the 25th section of the act of 1855 relative to criminal proceedings."

This case is instructive as showing that, notwithstanding its opinion in the earlier case, the supreme court of Louisiana still regarded the penalty unchanged by the privilege allowed the jury of adding the qualifying words to its verdict, which is exactly what the trial judge held at the trial of the cases at bar.

In *Mississippi* the act of March 4, 1875 (Acts 1875, p. 79), empowers the jury to declare in its verdict convicting any person of a capital crime that the punishment shall be imprisonment for life.

In Walton *vs.* State, 57 Miss., 533 (decided in 1879), the accused asked the trial court to charge the jury as follows:

"If after considering all the evidence, the jury find the defendant guilty as charged, beyond all reasonable doubt, they may in their discretion declare in their verdict that the penalty or punishment shall be imprisonment for life in the penitentiary. But if the jury should omit to so declare the penalty in their verdict the court shall pronounce the death penalty."

The trial court refused so to charge the jury, and at the request of the State charged as follows:

"If the jury from the evidence should find the defendant guilty and such should be their verdict, then they may, if they think proper, declare the penalty to be imprisonment for life in the penitentiary. But if they while agreeing in and agreeing to a verdict of guilty cannot agree as to adjudging the penalty to be imprisonment for life, then they shall return a verdict of guilty as charged in the indictment."

The jury found the defendant guilty as indicted. On appeal, a majority of the court set aside the verdict because of the failure of the trial court to inform the jury that if it did not declare that the punishment should be imprisonment for life the sentence would be that of death: upon the ground, as stated by the court, that it was possible that the jury did not know such to be the law.

In Spain *vs.* State, 59 Miss., 19 (decided in 1881), the second instruction given at the instance of the State was that if the jury should simply find the accused guilty as charged in the indictment, it would be the duty of the court to pronounce the death penalty, but that, if the evidence in the case warranted them in so doing, they might find him

guilty as indicted "and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life," or they might find the defendant not guilty (p. 20). Because of this instruction the Supreme Court reversed the court below, saying of the instruction (p. 24):

"It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life, instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it. The jury found the prisoner guilty, and he was sentenced to death. The record shows that the jury recommended the prisoner to the mercy of the court, in connection with the announcement of a verdict of guilty, and that the court on that announcement directed the jury to retire and bring in a verdict in accordance with the second instruction for the State. It seems highly probable that, but for this instruction, which made the right of the jury to fix the punishment to depend on its view that the evidence warranted it, the jury would have exercised its right to fix the punishment at imprisonment for life. But, independently of this, the error in the instruction requires a reversal of the judgment."

In *Texas*, the statute reads:

"The punishment for murder in the first degree shall be death or confinement in the penitentiary for life."

Revised Penal Code, art. 609.

In Doran *vs.* State, 7 Texas App., 385 (decided in 1879), the trial court instructed the jury as follows (p. 387):

"If you believe from the evidence that the defendant cut with a knife and killed William Fitzsimons, as charged

in the indictment, and that this was done with express malice and the evidence fails to show any circumstance of mitigation, excuse, or justification, you will then find him guilty of murder in the first degree, and will so say in your verdict, and you need not add more; in which case the law fixes the punishment of death. Or you may, in your discretion, fix his punishment at confinement in the penitentiary for life."

The court held this error, saying (p. 386):

"The provisions of our present code regulating the penalties for murder in the first degree are not similar in phraseology or effect to the laws in that respect in force in this State pending the existence and operation of the constitution of 1869. Under the latter, the penalty for murder in the first degree was fixed at death, but juries were authorized in their discretion to substitute imprisonment for life for the death penalty, in any case they might deem a proper one for the exercise of this discretion (Hunt *vs.* The State, *ante*, p. 212; Marshall *vs.* The State, 33 Texas, 664). It was proper to instruct the jury, in all prosecutions for murder while the constitution of 1869 was in force, that they might find the defendant guilty of murder in the first degree, and, if they did not desire to exercise their discretion as to the commutation, their verdict need only find the fact of guilt, the law fixing the penalty absolutely for that offense.

"By the changes in the law which took effect July 24, 1879, juries were again invested with the discretion as to the infliction of imprisonment for life instead of death; but this mode of punishment was made a distinct legal penalty, along with the other penalty of death; imposing a duty upon a court of stating both penalties to the jury, without any discrimination, express or by implication, as to which penalty was preferable, and leaving the jury to determine that question for themselves."

In Myers *vs.* State, 8 Texas App., 321 (decided in 1880), while the jury was out considering of its verdict, the Revised Penal Code of the State took effect and changed the penalty for murder in the first degree from death alone to death or imprisonment in the penitentiary for life. At the instance

of the prosecution, the court gave to the jury an additional charge, instructing them on this change of the law and directing them to find which penalty the defendant should suffer in case they found him guilty of murder in the first degree. The jury found the defendant guilty and fixed his punishment at imprisonment in the penitentiary for life. This was held error upon the ground that the law in force when the trial commenced was the law in the case until it ended, and the jury had no power to qualify its verdict: the court saying that the question which law was in force was controlled by article 6 of the penal title of the Revised Statutes. This case sheds no light upon the question under consideration, and is used only because it is the only Texas case other than that of Doran in which the statute allowing a qualification of the verdict in a murder case is considered.

In *Utah* there is a statute reading as follows:

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned in the penitentiary at hard labor for life, at the discretion of the court, and every person guilty of murder in the second degree, shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years."

Penal Laws, Utah, 1876, p. 586.

In the case of Hopt *vs.* Utah, 110 U. S., 574 (decided in 1884), this court had that statute under consideration, and held it error for the trial judge to have characterized the act for which the accused was on trial as "an atrocious and dastardly murder:" for the double reason that section 257 of the Code of Criminal Procedure of Utah forbids the trial judge to "charge the jury in respect of matters of fact," and that the effect of what the judge said was that "the jury might infer, in view of the language of the statute," that the act was murder in the first degree, and "the prisoner had the

right to the judgment of the jury upon the facts, uninfluenced by any direction of the court as to the weight of the evidence" (p. 583).

Again, in Carlton *vs.* Utah, 130 U. S., 83 (decided in 1889), this court had the Utah statute under consideration, and after quoting it uses these words (p. 86):

"It is clear that the authority given in the section last quoted to substitute imprisonment at hard labor in the penitentiary for life for the penalty of death when the accused is found guilty of murder in the first degree depends upon a previous recommendation to that effect by the jury. Without such recommendation, the court in the absence of sufficient grounds for a new trial has no alternative but to sentence the accused to suffer death. * * * The statute evidently proceeds upon the ground that there may be cases of murder in the first degree the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice. This object could only have been met through a recommendation by the jury that a lesser penalty be inflicted, and it is not to be presumed that they were aware of their right to make such recommendation."

And this court accordingly held that the failure of the trial court to instruct the jury upon the point prevented the jury from making a recommendation had it been disposed so to do.

Reviewing the several statutes and decisions above cited, some general observations naturally suggest themselves.

1. The Louisiana, Mississippi, and Utah cases are all affected by the important fact that the trial judge in each instance said something found by the appellate court to have been the equivalent of stating new matter of fact to the jury or of expressing an opinion upon the facts as developed by the testimony; conduct in each of the several jurisdictions concerned directly in conflict with the statute law or settled adjudication.

But the law of the United States is different. In a United

States court, such as the supreme court of the District of Columbia, administering the laws of the United States, the trial judge has the right to express his opinion upon the facts, a question no longer open to discussion. In Simmons *vs.* U. S., 142 U. S., 148, this court, speaking on that subject, says:

"The only exception argued is to the statement made by the judge to the second jury in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing, but at the outset of his charge he had told them in so many words that the facts were to be decided by the jury and not by the court, and it is so well settled by a long series of decisions of this court that the judge presiding at a trial, civil or criminal, in any court of the United States is authorized whenever he thinks it will assist the jury in arriving at a just conclusion to express to them his opinion upon the questions of fact which he submits to their determination."

2. There is no Federal decision directly in point. The decisions of this court in the Utah cases are really to the effect only, first, that the trial judge being forbidden by statute to charge the jury on matters of fact, any statement by him as to the effect of the evidence is error, as tending to deprive the jury of its right to fix the degree of guilt; and, secondly, that the failure of the trial judge to inform the jury of the existence of the law giving them the right to recommend the less punishment was error. But there is in the case of Sparf *vs.* U. S. (156 U. S., 51) a very helpful utterance of this court in the direction of illustrating the question under consideration.

In that case, which was on an indictment for murder, one of the main questions was as to the right of the jury to find the accused guilty of a less offense in conformity with the provisions of section 1035 of the Revised Statutes of the United States. That section reads as follows:

"In all criminal cases the defendant may be found guilty of any offense, the commission of which is necessarily

included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided that such attempt be itself a separate offense."

In dealing with that section the court said :

"The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not found to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offense, necessarily included in the one charged, or of the offense of attempting to commit the one charged."

This language clearly imports that in a court of the United States no jury will be justified in reaching a whimsical conclusion, or any conclusion inconsistent with the facts as developed by the testimony; which, in essence, is all that the trial judge in the cases at bar told the juries.

3. While the law of many of the States of the Union gives juries the right to fix the penalties for various offenses, as in the case of Illinois, already noticed, the general principle of the law governing a United States court is itself to fix the penalty in every case, leaving the jury only to determine the question of guilt or innocence. The statute under consideration departs from this principle to an extent, and it is a sound rule of construction that when a statute departs from a general principle of the law the courts will hold the departure to the narrowest compass rather

than unduly extend it. By the law of the United States, it is the function of the judge to lay down the law in criminal cases and of the jury to determine facts (Sparf *vs.* U. S., *ubi supra*), and it is the duty of the legislature to prescribe the punishment. The statute under consideration trenches upon the domain of the legislature to an extent, and gives to juries in cases contemplated by the statute a right not before existing and wholly at variance with the general principle underlying the criminal jurisprudence of the United States. Accordingly, the courts should rather restrain than enlarge the operation of this departure; and as it is within the clear province of the judge in a United States court to express his opinion upon the facts, and even, as in the Simmons case, to go the length of holding a jury to the firm discharge of its duty when the court sees that that duty is clear; so, in applying the statute under consideration, it must be the right of the trial judge to hold juries to the conscientious discharge of their duty, and to warn them against the arbitrary or whimsical exercise of a power which, as was pointed out in the cases at bar, might, as matter of fact, be extended to the acquitting of a plainly guilty man. To hold the contrary would seem to be to deprive the trial judge of the high right, belonging to every United States judge, of advising the jury in a criminal case.

4. The construction contended for in behalf of the petitioners in effect also involves the trenching by the jury upon the high prerogative of the executive in respect of pardons. If it be that in every case in which the statute is applicable the jury may of its own whim qualify its verdict, what is this more than to say that the power to commute a sentence of death into one of imprisonment for life is vested for the time being in any particular twelve men of the community who may happen to form the jury in a given

case to which the statute applies? In other words, it is no more than to say that every possible body of twelve persons qualified for jury service in United States courts is vested with the absolute power of commutation of sentence in the cases to which the statute applies. Regard being had to the principles of our system of jurisprudence, which so jealously keeps separate the several departments of government and the respective functions of judge, jury, and legislature, it cannot be that the courts will be astute to extend rather than to restrain so clear a departure from fundamental principles.

Passing from these general observations, and in support of the statement that the charge of the trial judge in the cases at bar was in exactly the spirit of the language of this court in the Sparf case, let us recall what the trial court said. As already pointed out in the Winston case, the court, dealing with the contention of counsel that because the jury had the right to qualify its verdict it was the jury's duty so to do, observed that, in his opinion, the qualifying words should not be added except in cases having palliating circumstances which would seem to justify and require the addition of the qualification. He distinctly told the jury, however, that it was its right and privilege in a proper case to qualify its verdict (*ante*, p. 12).

In the Strather case the trial judge distinctly told the jury that he could not control its action as to adding the qualification, but that the penalty for murder had not been disturbed by the act of Congress under consideration, and the jury should not interfere with it unless the circumstances were such as to satisfy it that the qualification should be added (*ante*, p. 13).

And in the Smith case the trial judge told the jury that the statute authorized the jury, if the evidence justified it

on its conscience in so doing, to qualify its verdict by adding the words "without capital punishment" (*ante*, p. 15).

Plainly the effect of the court's language in each case was that the act in question did not authorize the jury whimsically to abolish capital punishment in any given case, but that the statute did give the jury power to abolish capital punishment in any case in which the facts showed a less degree of willfulness or moral turpitude than in the ordinary case of murder. In principle this is the same thing that this court said in the Sparf case, namely, that in reaching its decision the jury must in every instance be guided by the evidence, and that under the law it has no arbitrary power to do what the evidence does not justify.

In this connection the Illinois cases above cited, and which are cited also by the Court of Appeals of the District in its opinion, are especially in point. In those cases the court held that inasmuch as the statute of the State authorized the jury in a murder case to fix the penalty in case of conviction at any punishment from imprisonment for fourteen years to death, it was proper for the jury to hear testimony, otherwise irrelevant and immaterial and therefore unlawful, which might tend to aid the jury in reaching a decision as to the penalty. This is nothing more than to say in another way that the discretion vested by the statute in the jury is to be exercised upon and guided by the facts and circumstances of the given case, and this in substance and effect is what the trial judge said to the juries in the cases at bar. What he said was, in a word, that the statute under consideration was not intended to vest the jury with the arbitrary, willful, or whimsical power to dispense with the death penalty in a case of murder, but that the object was to give the jury the power or privilege in cases seeming to warrant it so to qualify its verdict as to call for the lighter punishment.

And what is said in the briefs of counsel for the petitioners to the contrary calls for only passing notice. What was said by the trial judges in the Bram and other District court cases is, of course, of no moment in the discussion, as the question really received no consideration in those cases, the court contenting itself with informing the jury of the statute and its power thereunder. And what is said by counsel about the effect of the Louisiana decisions loses its point when it is considered, first, that those decisions in terms rest upon two statutes instead of one (as already pointed out), and, secondly, that in the debate in the House of Representatives while the statute in question was there pending, the author of the statute does not profess to adopt more than the principle of the statutes in force in other States as well as in Louisiana. Were it that at the time of the passage of the act under consideration the supreme court of Louisiana had in terms decided, in a case in which that was the sole or even controlling question, that the discretion of the jury was to be left absolute, there would be undoubted force in the contention of counsel based upon the principle that when one legislature adopts the act of another it adopts it with the construction of the highest court of the State of origin of the act at the time of adoption; but it would be not only unsafe, but also unsound, to say that the adopting State must be bound by a decision in which the adopted legislation is only one of the elements involved in the decision of the court of the State from which the legislation is adopted. As is seen upon a mere reading of the language of the Louisiana court, the trial judge in each case had in terms violated the statute of the State forbidding him to comment upon the facts, and had, indeed, pressed upon the jury by his own testimony facts wholly outside of the case on trial. Had the reviewing court stopped here a reversal would necessarily have followed, and surely the mere fact of coupling with its citation of the statute offended against the

other statute in relation to qualifying verdicts in capital cases cannot be considered as so clear and deliberate a construction of the latter statute as to bind any jurisdiction thereafter adopting the principle of that statute.

Respectfully submitted.

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